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Supreme Court of the United States

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JOHN F. DAVIS, CLE

October Term, 1968

[redacted] #47

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. [redacted]. #69

FRED FERNANDEZ,

Appellant,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

October Term, 1965

No. 580 Misc.

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA MCPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

No. 844 Misc.

FRED FERNANDEZ,

Appellant,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Appellees.

On Appeal from the United States District Court for the Southern District of New York

---

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of this Court, move to dismiss or affirm the appeals herein on the ground that they do not present a substantial federal question.

Opinions Below

The opinion of the three-judge statutory court, not yet reported, is set forth in the appendix of each of the jurisdictional statements filed.

Jurisdiction

This is an appeal pursuant to 28 U.S.C. §1253 from a judgment of a three-judge statutory court sitting in the United States District Court for the Southern District of New York (Friendly, U.S.C.J., Bryan, U.S.D.J., and Wyatt, U.S.D.J.), entered June 27, 1968, dismissing the complaints wherein appellants sought an injunction against the appellees and a declaratory judgment.

More specifically, the appellants, pursuant to 28 U.S.C. §§1343(3), 2201, 2202, 2281, 2284 and 42 U.S.C. §1983, sought a declaratory judgment that New York's former Penal Law, Sections 160, 161 and 163 and former Section 596(3) of the New York Judiciary Law are unconstitutional and also sought a permanent injunction restraining the prosecution of appellants in the New York State Courts.

A three-judge court was convened and held a hearing on the appellant's motions for a preliminary injunction and for summary injunction as well as appellees' motion for dismissal of the complaint.

In an opinion (*per* Friendly, U.S.C.J.), the three-judge district court unanimously dismissed the complaint.

Statutes Involved

The relevant statutes are New York's former Penal Law, Sections 160, 161 and 163 and former Section 596(3) of the New York Judiciary Law. These statutes are set forth in the appendix of each of the jurisdictional statements filed.

Questions Presented

1. Does the former New York Criminal Anarchy Statute (New York's former Penal Law, §§160, 161 and 163) raise a substantial federal question of constitutionality in view of the New York Court of Appeals' interpretation in *People* v. *Epton*, 19 N Y 2d 496 (1967), of the statute in conformity with the decisions of this Court in *Dennis* v. *United States*, 341 U.S. 494 (1951) and *Yates* v. *United States*, 354 U.S. 298 (1957) which interpreted as constitutional the virtually identical federal sedition act (18 U.S.C. §2385)?

2. Does the three-judge court's holding that the federal sedition act—commonly known as the Smith Act (18 U.S.C. §2385)—has not preempted New York's Criminal Anarchy Statute present a substantial federal question in view of this Court's holding in *Pennsylvania* v. *Nelson*, 350 U.S. 497, 499 (1956); in *Uphaus* v. *Wyman*, 360 U.S. 72, 76-77 (1959) and *De Gregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829-830 (1966)?

3. Does the $250 property requirement for grand jury service provided for by former Section 596(3) of the New York Judiciary Law raise a substantial federal question in

view of the undisputed fact that no person has ever been disqualified for jury service in Queens County for thirty years because of such statutory requirement?

Statement of the Facts

Appellants were indicted on or about June 12, 1967 by a Queens County grand jury and charged therein, *inter alia*, with having violated Sections 160, 161, 163 and 580(1) of New York's former Penal Law, to wit, advocacy of criminal anarchy, permitting premises to be used for assemblage of anarchists, and conspiracy to commit the crime of advocacy of criminal anarchy.

The indictment was dismissed on or about January 17, 1968 by the Criminal Term of the Supreme Court, Queens County (Shapiro, J.), upon demurrers interposed by the appellants for various deficiencies in the form of the indictment. Leave was granted by the Court to the District Attorney to re-present the case to the grand jury.

On or about January 17, 1968, a superseding indictment was filed accusing the appellants of same crimes charged in the earlier indictment.

Since the filing of the original indictment in June, 1967, the appellants have made numerous motions attacking the original and superseding indictments on the grounds upon which these present appeals are predicated. The motions were denied on the merits in opinions by Mr. Justice Shapiro of the Supreme Court, Queens County. In the event that the appellants are convicted, the questions here

involved can be reviewed by the New York appellate courts upon appeal from the judgment of conviction (N.Y. Code Crim. Proc., §517).

The Indictment

The superseding indictment here in issue contains forty-eight counts. The first count charges Advocacy of Criminal Anarchy in violation of sections 160 and 161(1) of New York's former Penal Law in that appellants advocated orally and in writing the overthrow of the government of New York State and its political subdivisions "by force and violence, to wit, the use of rifles, shotguns, firearms, bombs and ignited gasoline against publicly owned and operated transportation facilities, and against executive officials of said State and its various political subdivisions and agencies, including peace officers thereof, and by assassination of said executive officials, and by other unlawful means and with the further intent that said acts be presently attempted and accomplished."

The second count alleges that, in violation of sections 160 and 161 (2), the appellants published and circulated certain printed matter urging the violent overthrow of the State and its political subdivisions and agencies "by force and violence, to wit, by sabotage of public transportation and communication facilities, assassination of police officers of said State and its various political subdivisions and agencies, and members of the State Guard of said State, and by other unlawful means, and with the further intent that said acts be presently attempted and accomplished."

The third count charges that, in violation of sections 160 and 161 (4), the appellants organized and helped to organize and became members of and voluntarily assembled with each other in a society formed to teach and advocate the doctrine that the governments of New York and its various political subdivisions and agencies be overthrown by force and violence as described in the first count.

A conspiracy to commit the crime alleged in the first three counts are set forth in a fourth count of the indictment (New York's former Penal Law, section 580).

Two other counts charge that the appellants Samuels and Stewart permitted premises to be used for the assemblage of persons assembled for the purpose of describing and teaching that the government of the State and its various political subdivisions and agencies should be overthrown by force and violence.

The balance of the counts charge the various appellants with weapons violations (former New York Penal Law, §1897). These counts are not here subject to attack.

POINT I

The New York statutes proscribing criminal anarchy are constitutional.

Section 160 of the New York Penal Law defines "criminal anarchy" as "the doctrine that organized government should be overthrown by force or violence, or by assassination of the executive head or of any of the executive officials of government, or by any unlawful means." Section 161 of the New York Penal Law prescribes the advocacy of criminal anarchy by speech or writing, or by organizing any group or assembly of persons formed to teach or advocate such doctrines. These statutes were upheld as constitutional in *Gitlow* v. *New York*, 268 U.S. 625 (1926), *affirming* 234 N. Y. 132 (1922); and in *People* v. *Epton*, 19 N Y 2d 496 (1967), *cert. den.* 390 U. S. 29. Appellants contend that they are void for vagueness, and violate freedom of speech. The claims are incorrect.

The statute was recently subject to the challenge of unconstitutionality in the New York Court of Appeals in *People* v. *Epton*, 19 N Y 2d 496 (1967), *cert. den.* 390 U. S. 29 (1968). There the Court of Appeals noted that it had previously upheld the statute's constitutionality in *People* v. *Gitlow*, 234 N. Y. 132 (1922), *aff'd sub nom. Gitlow* v. *New York*, 268 U. S. 652 (1926). It went on to discuss the amplification of the concepts of First Amendment freedoms since *Gitlow* by this Court and then definitively construed the statute in light of current constitutional concepts. The New York Court of Appeals in concluding that the statute is constitutionally viable today in light of

modern First Amendment concepts stated (*People* v. *Epton*, 19 N Y 2d, *supra*, at pp. 504-506):

"When we last considered the constitutionality of sections 160 and 161 of the Penal Law, we held, and the Supreme Court of the United States affirmed over the vigorous objection of Mr. Justice HOLMES and BRANDEIS, that they were constitutional (*People* v. *Gitlow*, *supra*, aff'd *sub nom. Gitlow* v. *New York*, 268 U S. 652). We are, of course, aware that the Supreme Court's view of the First Amendment's protection of speech has been altered drastically since *Gitlow* was decided. Although *Gitlow* has never been expressly overruled, it is now generally conceded that the HOLMES-BRANDEIS view in *Gitlow* which insisted upon a showing of 'clear and present danger' before one's freedom of speech may be abridged represents today's law (*Dennis* v. *United States*, 341 U. S. 494; *Yates* v. *United States*, 354 U. S. 298).

"We are thus presented with a statute which is unconstitutional as interpreted. The dissent contends that our decision in *Gitlow* reflects the Legislature's intent to make unlawful the mere advocacy of violent revolution, and that we are bound by our prior decision under the doctrine of *stare decisis*. We cannot agree.

"It must be assumed that the Legislature intended to enact a statute which was in harmony with the United States Constitution and the Constitution of the State of New York (*People* v. *Finkelstein*, 9 N Y 2d 342). When we first interpreted this statute in 1922, we did so in light of the prevailing conditions of that time and in accordance with the current understanding of First Amendment freedoms. As we have noted, reexamination of our First Amendment rights both by our court and the Supreme Court of the United

States has resulted in a clearer understanding of the scope of constitutional protection of speech. We have not had an opportunity, however, until now, to re-examine our determination in *Gitlow* in light of the recent developments in constitutional theory. Now that our criminal anarchy statute is again before us, we have the obligation of construing it in accordance with sound constitutional principles so as to preserve its constitutionality. (*People* v. *Finkelstein*, *supra*, p. 345; *Dollar Co.* v. *Canadian Car & Foundry Co.*, 220 N. Y. 270.)

* * *

"What are these sound constitutional requirements which must now be read into our criminal anarchy statute to preserve its constitutionality? It is clear that the prescription of mere advocacy of the violent overthrow of the Government would be an unconstitutional infringement upon free speech (*Dennis* v. *United States*, *supra*). The advocacy of the overthrow of the Government by force and violence must be accompanied by an intent to accomplish the overthrow (*Dennis* v. *United States*, *supra*; *Keyishian* v. *Board of Regents*, 385 U. S. 589) and there must be a 'clear and present danger' that the advocated overthrow may be attempted or accomplished (*Dennis* v. *United States*, *supra*)."

The reasonable construction of a statute so as to conform it to the Constitution and preserve its validity is a basic principle of statutory interpretation. Indeed, this Court has followed the principle in construing a federal enactment virtually identical to New York's criminal anarchy statute [*Dennis* v. *United States*, 341 U.S. 494 (1951); *Yates* v. *United States*, 354 U.S. 298 (1957)]. Thus, the indictment in the instant case properly charges that Sec-

tions 160 and 161 of the Penal Law interdicts only an intentional call to action under circumstances of clear and present danger, excluding mere advocacy of doctrine from the scope of the statute. As noted, the New York Court of Appeals, in *Epton*, reaffirmed this interpretation in its opinion. So defined, these statutes are unquestionably valid.

The distinction between advocacy of doctrine and intentional advocacy of action has been recognized as part of the New York statutes since the *Gitlow* case itself. In *Gitlow* v. *New York*, *supra*, this Court noted with approval that the trial court had charged the jury to "determine what was the intent, purpose and fair meaning" of the defendant's writing [268 U.S. at 661]. Construing the statute, the majority opinion stated:

> "The statute does not penalize the utterance or publication of abstract 'doctrine' or academic discussion having no quality of incitement to any concrete action. * * * It is not the abstract 'doctrine' of overthrowing organized government by unlawful means which is denounced by the statute, but the advocacy of action for the accomplishment of that purpose" [*id.* at 664-5].

Similarly, in *Yates* v. *United States*, *supra*, this Court construed the Smith Act—a federal enactment "nearly identical" to the New York criminal anarchy statutes—to contain implicitly the distinction between advocacy of doctrine and of action; the Court noted that "This distinction was heavily understood in *Gitlow* v. *New York*. * * *". And this Court was able to read the distinction into the Smith Act, in good part, because New York's criminal anarchy law was "the prototype" for the federal statute [*Yates* v. *United States*, *supra* at 318-320].

The majority in *Gitlow*, however, upheld the constitutionality of the New York statutes without limiting their applicability to instances of clear and present danger, thereby taking "a narrow view * * * of the First Amendment" [*Yates* v. *United States*, *supra*]. The views of Mr. Justice Holmes, dissenting in *Gitlow*, are now generally accepted [*Dennis* v. *United States*, 341 U.S. 494, 507 (1951)]. But by no means may this development of constitutional rights be taken to mean that the statutes upheld in *Gitlow* are now unconstitutional. Rather, Mr. Justice Holmes' dissent itself indicated that the statutes are constitutionally valid, if their applicability is limited to instances of "clear and present danger," as was done in this case:

> "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that [the state] has a right to prevent" [*Gitlow* v. *New York*, *supra* at 672-673 (dissent)].

Accordingly, a generation later, with reference to the Smith Act, which in its language makes no mention of "clear and present danger," this Court stated:

> "The question in this case is whether the statute which the legislature has enacted may be constitutionally applied. In other words, the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction. We hold that the statute may be applied where there is a 'clear and present danger' of the substantive evil which the legislature had the right to prevent * * * We see no difference from the standpoint of vagueness, whether the standard of 'clear and present danger' is one contained in haec verba within

> the statute, or whether it is the judicial measure of constitutional applicability" [*Dennis* v. *United States*, 341 U.S. 494, 514-515 (1951)].

By "clear and present danger," this Court did not indicate that the government must actually face overthrow, but that the prescribed advocacy takes place under circumstances "such as reasonably to justify apprehension that action will occur" [*Yates* v. *United States*, *supra* at 321; *Dennis* v. *United States*, *supra* at 509-511].

Certainly, then, appellants may claim no privileged advocacy of political "ideas" which are, in fact, a call to violent action at this time in our history when violence seems to be the order of the day, where the danger of violence is already present. Worse than falsely shouting fire in a theatre [*cf. Schenk* v. *United States*, 249 U.S. 47 (1919) (*dissent*)], appellants are accused of calling for more explosions from a "tinderbox" already aflame. As Mr. Justice Douglas stated in a hypothesis now tragically come true:

> "If this were a case where those who claimed protection under the First Amendment were teaching * * * the planting of bombs, the art of street warfare, and the like, I would have no doubts. The freedom to speak is not absolute; the teaching of methods of terror and other seditious conduct should be beyond the pale along with obscenity and immorality" [*Dennis* v. *United States*, *supra* at 581 (*dissent*)].

Appellants contend that the adoption of a "new" construction of the state anarchy statute by the New York Court of Appeals in *Epton* deprives them of due process. In *People* v. *Gitlow*, *supra*, the state court had already

construed the statute to apply only to deliberate, intentional advocacy, not to theoretical, abstract advocacy; the decision in *Epton* added nothing new in this respect. But the clear and present danger test was rejected by the New York Court of Appeals and this Court in *Gitlow*, and was not expressly announced as applicable to the New York statute until *Epton*. Appellants urge, as did Judge Burke in dissent in *Epton* that they are not given adequate notice of the statute's meaning. This argument lacks merit.

While it is true, as appellants urge, that a penal statute must give adequate notice of the conduct proscribed—of the elements of the crime—the clear and present danger test is not an element of the crime, but a "judicial measure of constitutional applicability," a standard as to when certain conduct set forth in a statute may constitutionally be punished [see *Dennis* v. *United States*, *supra*, 341 U.S. at 514-515]. Indeed, at a jury trial for criminal anarchy the trial court alone may rule on the issue of clear and present danger [*id.* at 513]. Thus, the *Dennis* and *Yates* decisions, while limiting the circumstances under which advocacy of anarchy could be prohibited, did not re-define the conduct itself. Analogously, in *Ginsburg* v. *United States*, 383 U.S. 463 (1966), this Court applied to federal obscenity statutes a new test of evidence, looking to the circumstances under which publications were advertised and distributed, to determine whether they were obscene. While broadening previously announced rules as to the applicability of the obscenity test, the change did not, in the view of the majority of the Supreme Court, deprive the defendant of the adequate notice.

Moreover, as was pointed out in *Epton*, Sections 160 and 161 of the New York Penal Law have remained on the books since the *Dennis* decision, and no change has occurred in the statute on its face.* The New York Court of Appeals has consistently applied the presumption that the legislature intends to enact statutes which are in harmony with the Constitution; therefore, appellants were on notice of the clear obligation of New York courts to construe the anarchy statute in accordance with sound constitutional principles. In short, the conduct charged in the indictment here was "within the reach of an acceptable limiting construction readily to be anticipated as the result of a single criminal prosecution" [see *Dombrowski* v. *Pfister*, 380 U. S. 479, 491 (1965)]. Provided there is fair warning, "once an acceptable limiting construction is obtained, it may be applied to conduct occurring prior to the construction" [*id.* at 491, n. 7]. Moreover, appellants' deliberate advocacy of the overthrow of the government of New York State and its local governments by force and violence and with the intent that such overthrow be presently attempted and accomplished is "the sort of 'hard core' conduct that would obviously be prohibited under any construction of the statute" [*id.* at 491-492]. Hence, the claim of vagueness is without merit.

* In 1965 the state legislature enacted a Revised Penal Law, effective September 1, 1967, which carried over the former anarchy statutes as follows:

"§240.15 Criminal anarchy.

"A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow * * *."

In this connection, the appellants' contention that the New York Court of Appeals unconstitutionally construed the anarchy statute in *Epton* comes with ill grace. As seen, the New York Court of Appeals in construing the statute —"the prototype" of the Smith Act— did so in precisely the same manner in which this Court construed the Smith Act in *Dennis* and *Yates*. It thus defies logic and common sence to contend that a state statute is unconstitutional when the identical federal statute has been held constitutional by this Court.

Appellants argue, however, that the criminal anarchy statutes have effectively been declared unconstitutional in the recent decision of *Keyishian* v. *Board of Regents of the State of New York*, 385 U. S. 589 (1967). *Keyishian* dealt with Section 3021 of New York's Education Law and Section 105 of the New York Civil Service Law. These two statutes disqualified from civil service and teaching positions persons who uttered "seditious" words or did "seditious" acts. The term "seditious" was equated with criminal anarchy as defined by the Penal Law [35 U.S.L.W at 4153-4154]. In analyzing the civil service statutes this Court found that the reference to the Penal Law definition was uncertain, and therefore held the civil service statutes to be unconstitutionally vague. This pronouncement has no effect, however, on the instant prosecution, where the appellants were indicted for their acts under the safeguards and standards of the criminal law [*cf. Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 69-70 (1963)].

In *Keyishian*, a declaratory judgment action, this Court had before it an entire statutory scheme of administrative

regulation without benefit of specific application, or of interpretation by the courts of New York State. Thus, the Court dealt with all possible ramifications of the civil service statutes, noting the uncertainty as to whether all the provisions of Section 161 of the Penal Law were incorporated into the civil service laws at issue. "If so," this Court noted, "the possible scope of 'seditious' utterance or acts has virtually no limit." For example, citing the least defensible subdivision of Section 161, one not involved in the instant case, this Court deferred to the possibility that "the teacher who carries a copy of the Communist Manifesto on a public street" could be affected by the wording of subdivision 2 of Section 161 of the Penal Law, as incorporated into the Civil Service Law. The Court concluded that this language had the effect of stifling the ability of teachers and others to speak freely [35 U.S.L.W., at 4154-4155]. This consideration does not apply to the instant case, where there is a specific indictment, charging acts which, under any view of the applicable law, could not be constitutionally privileged. Here, "the Court must examine judicially the application of the statute to the particular situation, to ascertain if the Constitution prohibits the conviction" [*Dennis* v. *United States, supra; cf. Dombrowski* v. *Pfister,* 380 U.S. 479, 490-492 (1965)].

Further, and most significantly, the civil service statutes at issue in *Keyishian* did not simply render removal from public employment contingent on the actual commission of the crime of criminal anarchy; one was subject to discharge merely on "utterance" of seditious words or the "doing" of seditious acts. This Court was, therefore, concerned with the "indefinite" scope of the Penal Law's definition

of criminal anarchy [Penal Law §160], when applied to the civil service laws there at issue. "The teacher," the Court stated, "cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine. The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts" [35 U.S. L.W. at 4154]. But a defendant's seditious intent is a basic element of the crime of criminal anarchy, as is the requirement that the proscribed language constitute a call to illegal action [*Gitlow* v. *New York, supra; Yates* v. *United States, supra*; *People* v. *Epton, supra*]. Thus, in discussing this fatal weakness of the civil service statutes, the *Keyishian* opinion by no means invalidated this State's criminal provision on sedition.

The appellants cite cases for the contention that statutes similar to the New York anarchy laws have been deemed unconstitutional since the *Keyishian* decision.

The contention is incorrect since the cases are inapposite and readily distinguishable.

In those cases the courts struck down statutes "when the mere advocacy of abstract doctrine is apparently included * * * [and the statutory] language may reasonably be construed to cover mere expression of belief." [*Keyishian, supra,* 385 U.S. at 601].

POINT II

Sections 160 and 161 of the New York Penal Law, insofar as they proscribe criminal anarchy against the State and local governments, have not been preempted by the Smith Act.

The indictment charges the appellants with advocating the violent overthrow of the organized government of the State of New York. As seen, the New York Court of Appeals in *Epton* held that the New York statute pertains to the State only. The appellants, however, contend that even as applied to the State's government, the criminal anarchy statute is not valid law, having been superseded by federal legislation.

Concerning the scope of Sections 160 and 161 of the New York Law, the New York Court of Appeals in *People* v. *Gitlow*, 234 N.Y. 132 (1922), *affirmed* 268 U.S. 652 (1925), stated:

> "* * * We may fairly assume that the legislature would think of self-preservation rather than the protection of foreign governments. When therefore, in these sections it used the words 'organized government' it must have referred to all organized government in this country, whether it be that of the city, state or nation * * * [*id.* at 138].

In 1940, however, the Smith Act [18 U.S.C. §2385] was enacted, declaring it a federal crime to advocate the forceful overthrow of "the government of the United States or the government of any State, Territory, District or Possession thereof, or the government of any political subdivision therein. * * *" The appellants, citing *Pennsylvania* v.

Nelson, 350 U.S. 497 (1956), argue that the Smith Act has superseded all state and local legislation concerning sedition.

The appellants' analysis is incorrect, for this Court's decision in *Nelson* specifically held that state anti-sedition laws are superseded only insofar as they outlaw sedition against the federal government [*id.* at 499]. As the Court made quite clear [*id.* at 499], the Supreme Court of Pennsylvania had found that there was no evidence whatever that Nelson uttered "a single word indicating a seditious act * * * directed against the Government of Pennsylvania" [*Commonwealth* v. *Nelson*, 377 Pa. 58, 104 A. 2d 133, 139 (1954)].

The limited extent of the federal pre-emption doctrine in the area of anti-sedition legislation was further emphasized in *Uphaus* v. *Wyman*, 360 U.S. 72 (1959). Discussing the *Nelson* decision, this Court stated:

> "* * * The opinion made clear that a State could proceed with prosecutions for sedition against the State itself. * * * Nor did our opinion in *Nelson* hold that the Smith Act had prescribed state activity in protection of itself either from actual or threatened 'sabotage or attempted violence of all kinds.' In footnote 8 of the opinion it is pointed out that the States had full power to deal with internal civil disturbances. Thus * * * the subversive instigation of riots and a host of other subjects directly affecting state security furnish grist for the State's legislative mill" [*id.* at 76-77].

And recently this Court has again recognized that state legislation in the area could be applicable where there is a showing of "present danger of sedition against the State itself, the only area to which the authority of the State

extends" [*De Gregory* v. *Attorney General of New Hampshire*, 383 U.S. 825, 829-830 (1966)]; pre-emption occurs, this Court affirmed, if the state's sedition legislation "purports to extend its protection to the Federal Government as well" (*id.* at 827, n. 2), a situation absent here. The New York Court of Appeals in *Epton* and the high courts of other states which considered the validity of their sedition laws in light of *Pennsylvania* v. *Nelson* all have upheld their statutes insofar as they apply to acts of sedition where the state is the target, though dismissing indictments in which participation in nationwide sedition was the *corpus* of the crime charged [*e.g.*, *Commonwealth* v. *Gilbert*, 334 Mass. 71, 134 N.E. 2d 13 (1956); *Braden* v. *Commonwealth*, 291 S.W. 2d 843 (Ky. 1956); *State* v. *Cade*, 153 So. 3d 382 (La. 1963); *State* v. *Levitt*, 203 N.E. 2d 821 (Ind. 1965); *Albertson* v. *Maillard*, 345 Mich. 519 (1959); *Pennsylvania* v. *Dolson*, 183 Pa. Super. 341 (1967)].

New York's anarchy statutes, therefore, remain valid to the extent that they are directed to sedition against the State and localities within the State. Of course, the instant case provides an excellent example of a seditious crime in which State and local government was more directly challenged than was the federal government. The appellants' acts were designed to overthrow the State and local governments by sabotage and killing of State officials. Here the State's legislation pointing to its own self-protection is justly and properly enforceable.

POINT III

The system of selecting grand jurors in Queens County is constitutionally proper.

The appellants contend that the two hundred and fifty dollar ($250.00) property requirement of former Section 596 of the New York Judiciary Law violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and that Section 609 of the Judiciary Law establishes arbitrary standards for the selection of grand jurors, thereby permitting the jury clerk to discriminate in the selection of persons for grand jury service. These claims have no merit.

Interestingly, the jury property qualification here in question was the subject of attack in *United States* v. *Foster,* 83 F. Supp. 197 (S.D.N.Y. 1949) when the New York statute governing jury selection governed jury selection in the federal courts sitting in New York. Judge Medina held that the claim that such provision violated the Fifth and Sixth Amendments to the United States Constitution seemed "frivolous" and that if the provision were "* * * deemed for any reason unwise, this is a matter for the consideration of the Congress" (83 F. Supp., *supra*, at p. 208). Since that time, the Congress has enacted legislation in this area omitting property requirements for jury qualification (28 U.S.C., §1861 ff.): and, effective September 1, 1967, the property requirement is no longer a qualification for jury service in New York (Chapter 49 of the Laws of 1967).

It may well be that developing concepts of due process and equal protection since *Foster* would mandate the unconstitutionality of a property requirement for jury service where employed to disqualify otherwise qualified jurors. Here, however, in this case the evidence indicates quite the contrary. In Queens County, for thirty years, not one person has been rejected for jury service for possessing less than two hundred and fifty dollars ($250.00) in property. In this regard no distinction was made in the selection of petit and grand jurors.

Concerning the appellants' second attack on New York's jury statutes, Judge Friendly in the opinion for the Court below stated:

> "We find far less force in plaintiffs' attack on former subdivision 6, now 5, of §596 of the Judiciary Law providing that to serve as a grand juror, a person must '* * * be intelligent; of sound mind and good character; well informed * * *,' in the absence of evidence of abuse, see Swain v. Alabama, 380 U.S. 202, 205-06, 209 (1965); Chestnut v. New York, 370 F. 2d 1, 7 at n. 13 (2 Cir. 1966), cert. den., 386 U.S. 1009 (1967). Rabinowitz v. United States, 366 F. 2d 34 (5 Cir. 1966), on which plaintiffs rely, did not hold such standards to be unconstitutional, the decision went rather on the ground that the clerk and the jury commissioners had superimposed additional standards of their own, designed in part to diminish the number of Negro jurors, on the uniform standards enacted by Congress in 1957, 28 U.S.C. §1861."

Conclusion

The appeals should be dismissed or affirmed.

Respectfully submitted,

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